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BEFORE THE
SUBCOMMITTEE ON REGULATORY AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING: IMPROVING INFORMATION QUALITY IN THE FEDERAL GOVERNMENT

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Ms. Chairman and Members of the Subcommittee, I am Mark Greenwood, partner in the law firm Ropes & Gray. I serve as counsel to the Coalition for Effective Environmental Information (CEEI), a group of companies and business organizations interested in the policies guiding how government agencies collect, manage, use and disseminate environmental information.

We appreciate the opportunity to appear before this committee to address the important topic of how the federal government is implementing the Information Quality Act (IQA). While our organization was not involved in the enactment of this statute, we have been active in its implementation. In our view, the core objectives of the IQA represent common sense values that the public, the agencies and all interested parties should be able to embrace.

We recognize, however, that substantial debate has arisen around the implementation of the law. In our view, many of the concerns that have been expressed about the potential adverse effects of the IQA on agency rulemaking or public access to information have not materialized in practice. But given those concerns, we think it is particularly valuable for this committee to initiate this hearing to review the experience with the IQA. Hopefully your efforts will assist resolution of some of the implementation issues that have made the law more controversial than is warranted.

In my testimony today, I will address three topics: (1) the importance of the IQA in the rapidly developing world of "E-Government"; (2) the common sense nature of the IQA's policies; and (3) the implementation issues that need resolution if the IQA is to achieve its potential.

The IQA's Objective – High Quality Information for Public Use – Is a Critical Need in the Development of "E-Government"

The federal government has long been in the business of collecting and disseminating information for public use. In the last decade, however, governmental activity in this area has taken on much greater significance.

In particular, the Internet has played a transformational role. Today the federal government routinely assembles data that have historically been used only by government workers and delivers this data electronically to computer desktops all over the world. This is a qualitative change in public access to government data, which has many positive implications. At the same time, it places much greater responsibility on government agencies to explain the limitations of these data, which are well-understood by those who work routinely with the data but not by the general public.

The power of Internet access to information has also accelerated the tendency of government agencies to use disclosure of information as a policy tool to influence behavior, in lieu of regulation. In the environmental field we have seen the growth of "public right to know" programs that disclose information about the environmental performance of specific companies, facilities and products. One of the best known programs of this nature is the Toxic Release Inventory that reports annually on releases of hundreds of chemicals from thousands of facilities.

Public disclosure of information now plays a central role in a variety of EPA programs. The proliferation of this approach is reflective of a philosophy that EPA articulated in a report issued in the mid-1990's:

> EPA does not produce widgets, maintain parks, or fight wars. EPA's products are information-based products, whether they be rules,

> environmental education, new science, or enforcement actions…Information that is cared for as an asset, that is treated as a trust for all staff, EPA's partners and the public, is the ultimate weapon in EPA's mission to protect the environment.[1]

While this reference to information as a "weapon" raises some concern, the assumption that agencies like EPA can and should employ information dissemination in pursuit of their missions is now widely accepted. Over the last ten years, the government's expanded use of the Internet has matured into the concept of "E-Government". In essence, agencies are now expected to exploit the powers of computing and electronic networking to enhance services, open up new sources of information to the public and make agency operations more efficient.

A wide variety of federal agencies now maintain complex, multi-faceted Websites. Some of the most basic functions of government are now being transacted in the electronic medium, including reporting, rulemaking and permitting. Through innovative sites like FirstGov.gov, the federal government is aligning agency sites and providing more effective public access to a wide range of government information sources.

The Congress has supported these developments with funding and a variety of statutes setting the expectations for what should be done. Over the last several years, Congress has enacted laws such as the Electronic Freedom of Information Act, the Government Paperwork Elimination Act, the Electronic Signatures in Global and National Commerce Act and the E-Government Act, all of which were designed to facilitate some aspect of "E-Government".

The move toward E-Government is a positive trend that offers benefits to a wide variety of parties. There is, however, an essential policy that must be a central element of the E-government framework: a commitment to high-quality information.

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[1] U.S. EPA, *Providing Information to Decision Makers to Protect Human Health and the Environment: Information Resources Management Strategic Plan,* EPA Pub. No. 220-B-95-002, at 30 (April 1995).

Without that commitment to quality, the value of E-Government will be lost to everyone. The users of information will be short-changed. Those who are characterized by government information may experience unfair economic harm. Policymakers in agencies and the Congress can make unwise choices if they rely on faulty data. Indeed, government information continues to enjoy a presumption of validity in the public's mind that carries with it a special responsibility for quality to make sure that this reputation is warranted.

Over the last several years, the importance of information quality has been recognized in a variety of agency and Congressional initiatives. Yet none of these efforts have been as comprehensive or systematic as the effort to enact and implement the IQA. This statute is now the centerpiece of the effort to bring a commitment to quality to the expanding world of E-Government. Thus the IQA plays an essential role that must be maintained and refined over time.

In our view, the IQA is one of the core "good government" laws of the Information Age, which should be thought of in the same vein as the Freedom of Information Act (FOIA).

The IQA and the OMB Guidelines Establish a Reasonable Set of Core Policies

Everyone can endorse "information quality" as an important value. Yet this term is amenable to differing interpretations. One of the key roles of the IQA and its implementing guidelines is the translation of "information quality" into a set of concrete principles. Through a two-year process that began after the IQA's passage, OMB and the agencies have crafted a reasonable set of standards that reflect a common sense ethic about what information quality should mean.

These standards for information quality emphasize data accuracy and transparency in analytical work. For example, the OMB Guidelines introduced the standard of "reproducibility" in analytical work, as a refinement of the statutory standard of "objectivity". This obligation to assure "reproducibility" means that agencies must explain the methods and assumptions used in their analyses with sufficient clarity to allow someone else to replicate the analysis and thereby understand how an agency reached its conclusions.

The IQA's emphasis on assuring transparency of agency analyses and conclusions is a particularly important aspect of the law. This emphasis further underscores the IQA's alignment with FOIA. The IQA assures that the rationale for the government's conclusions are disclosed, while FOIA assures public access to government documents.

As another means to assure objectivity of information, the OMB Guidelines have emphasized the value of peer-reviewed scientific information. Agencies are called upon to use best available peer-reviewed data and to employ best available methods for collecting information. This obligation does not unnecessarily constrain agencies, recognizing that they must rely upon "available" information to reach conclusions.

The statute and OMB Guidelines have drawn the scope of the IQA broadly, applying its terms to most agencies and most forms of information dissemination. OMB has been criticized for including information arising in a rulemaking within the scope of the IQA. Certainly the substantive and procedural provisions of the IQA are most clearly needed for the non-regulatory actions that agencies take, such as public Websites, where no such standards exist.

Nonetheless, OMB was also correct to recognize that the same standards of quality should also apply to information used in rulemaking. Information used in a rulemaking can have a life of its own, independent of the particular rule under development. For example, an inaccurate characterization of a product as unsafe by a government agency can have immediate impact in the marketplace. Application of the IQA's procedural provisions to information used in rulemaking does raise some issues about how those provisions should be reconciled with the rulemaking procedures of the Administrative Procedure Act. The OMB Guidelines have developed a workable solution for reconciling these parallel sets of procedures.

Perhaps the most important aspect of the IQA is that it makes customer needs a central focus of the law. The standards for the "objectivity" and "utility" of information each emphasize the need to communicate effectively with all interested audiences, including the general public. This responsibility goes beyond the need to offer accurate

information. Agencies must also put information in context and make it understandable to a wide audience.

In contrast to most pre-existing federal laws on information management, the IQA offers a *procedural* mechanism to assure that agencies are responsive to customers. Interested parties are explicitly given an opportunity to "seek and obtain" correction of information that does not meet the IQA standards. Most federal agencies have now established such procedures, including deadlines for action, appeal rights and public Websites documenting the progress of individual correction requests.

In essence, the IQA is recognizing a public right to high-quality information from government. This right is made tangible by the procedural protections of the statute and the OMB Guidelines. This is an extremely important aspect of the IQA that must be maintained and fairly implemented.

These basic principles of the current IQA represent common sense. They reflect mainstream values about what the government should be providing the public. In fact, many Americans have probably assumed that these obligations have been part of the law for some time. Importantly, the IQA establishes neutral principles that do not favor one faction over another. In this sense, the IQA is a statute for everyone.

Several Issues Need Special Attention in the Continuing Implementation of the IQA

Given the mainstream values embodied in the IQA, it has been somewhat surprising that this law has generated so much debate. The continuing controversy surrounding the IQA is additionally surprising because many of the concerns that were initially expressed about the law have not materialized during the last three years since the OMB Guidelines were issued.

The record does not show that agencies have been overwhelmed by correction requests. There also is little evidence to suggest that the IQA has derailed many rulemakings or stalled public access to information as a general matter.

Nonetheless, criticisms of the IQA continue. This controversy is likely to diminish over time if certain implementation issues can be resolved. We believe that resolution of the following issues would greatly enhance the long-term success of the IQA:

1. The IQA's Scope and Remedies

The IQA's obligations apply to information that is disseminated to the public. Under OMB's Guidelines, an agency "disseminates" information when it publicly presents information that the agency has adopted or endorsed.

Recent interpretations of the IQA by the agencies have suggested that certain publicly available documents are not subject to the IQA if they are considered to be preliminary documents for review, such as a draft risk assessment. Similarly, agencies have ruled that certain agency planning documents that are intended primarily for intra-agency review are not subject to the IQA, even though copies of such documents have been provided to the public.

These interpretations have the potential to erode the broad applicability of the IQA. Once agencies begin to circulate documents containing agency conclusions, the impact of those documents, including public reliance on the conclusions in the documents, will begin. The fact that an agency may attach a label such as "draft", "preliminary" or "planning" to the document does not necessarily negate the impact of the document. This is particularly true when such a document remains in place for some time. For example, EPA has issued various versions of its cancer risk assessment guidelines. Despite the fact that these versions of the cancer guidelines carried a "draft" label, they were used as operative EPA policy throughout Agency and state programs for many years.

It is not surprising that agencies will look for opportunities to narrow the scope of the IQA's applicability. Such efforts will, however, be resisted strongly by interested parties who seek broad applicability of the law's principles. Until the full scope of the IQA is clarified, controversies will continue.

The question of what constitutes an appropriate remedy for an IQA problem has been a particularly volatile issue. Much of the controversy surrounding the IQA can be traced to disagreements in this area.

The IQA addresses the quality of information. This means that the remedy for an IQA problem is an "informational" remedy. In some cases, data needs to be modified to be more accurate. In other cases, further explanation is needed to put information in context. In rare cases, where information is fundamentally flawed, it may be necessary to remove data from public Websites.

The remedy for an IQA problem, however, is not the withdrawal of a regulation. While information violating the IQA standards may have been used as a justification for a particular rule, the legal remedies for changing the rule itself must be defined under the organic statute authorizing the rule and the Administrative Procedure Act. This distinction between *information* in a rulemaking and the *rule itself* has become confused in some correction requests that have been filed. As a result, critics of the IQA have mistakenly seen the law as an industry tool to attack federal regulations.

Similarly, the IQA does not dictate a particular philosophy for how agencies must define the public interest in making decisions in areas of scientific uncertainty. The IQA applies to scientific assessments, but the OMB Guidelines simply call on agencies to use best available peer-reviewed data in reaching decisions. This common sense directive requires agencies to make reasonable judgments based on such data. It does not eliminate agency discretion to act or reach judgments to protect health or the environment in the absence of complete information.

The issues about the scope and remedies of the IQA are now being debated in the context of individual correction requests. Some of these debates may have to be resolved in the courts. Until these issues are resolved, the practical meaning of the IQA will remain uncertain.

2. The Appropriate Level of Accountability and Oversight

A statute like the IQA will not lead to significant change in agency information management practices until it is clear how compliance with the law will be assured. As a practical matter, this becomes a question of who in the agencies will be accountable for the law's implementation and who will oversee agency behavior.

At the agency level, it has not been clear what internal management systems have been put in place to assure that the IQA's standards will be met. What efforts have agencies undertaken to provide for staff training about the law? What set of incentives and disincentives have agencies established to assure staff compliance? How have the IQA standards been woven into the fabric of agencies, including matters of planning and budgeting?

An important strategic question in this regard is who has lead responsibility for implementation of the IQA in an agency and what powers have been given to that leader to assure that there are consequences associated with noncompliance with the law. For example, is the IQA steward a "gatekeeper" to the agency's Website to assure that only information meeting the law's standards will be posted electronically?

At an Executive Branch level, OMB clearly has the lead responsibility to assure compliance with the statute. To assist this oversight role, OMB has required agencies to report on correction requests that have been filed. While this is a logical first step in an oversight function, a focus on correction requests alone does not provide a deeper insight into how agencies are assuring compliance with the law. For example, it does not provide OMB with an understanding of the internal management systems that agencies will be using to assure compliance.

At a broader level of oversight, the important question is the availability of judicial review of agency decisions to deny correction requests. A few IQA disputes have progressed to the courts, resulting in initial decisions denying judicial review of such agency decisions. It will take some time before this question is completely resolved through the courts.

The availability of judicial review for IQA correction requests is a fundamental matter that will ultimately determine the success of the law. We believe that judicial review should be available for several reasons. Judicial review is one of the best safeguards to assure compliance with law. Federal administrative law establishes a presumption in favor of judicial review for agency actions. Such review has historically been allowed for decisions under information management laws like FOIA. There is no compelling reason to treat decisions under the IQA differently.

Furthermore, the availability of judicial review, even if it is only invoked infrequently, provides an appropriate incentive to the agencies. Agency staff are busy and must make choices about what legal mandates deserve the greatest attention. The availability of judicial review is a signal that the Congress and the courts take a law seriously. Federal law includes a variety of statutes that are essentially hortatory in nature, creating no agency consequences for non-compliance. Such mandates are least likely to draw agency commitment and resources.

At all three levels described above, there is substantial uncertainty. Without further clarity about the system of accountability and oversight for the IQA, we will not know whether the law will be taken seriously.

3. Systemic Change to Improve Information Quality

If this committee were to examine implementation of the IQA five years from now, we would have to conclude that the law had not achieved its potential if the primary discussion was about the status of correction requests. The IQA establishes a general mandate for agencies to assure information quality in all of its work. In most agencies this will require various forms of systemic change to achieve the statutory goals.

OMB has recognized the need for agencies to build information quality into the fabric of their work. In particular, the OMB Guidelines call upon agencies to establish mechanisms for "pre-dissemination review" to assure that the standards of the IQA are met before information is disseminated to the public. OMB anticipates that such review is built into each stage of information development, rather than being a late-stage "clearance" process.

Little information is available on how agencies are implementing this aspect of the IQA standards. Yet this mandate is one of the most fundamental needs. While the availability of information correction mechanisms is useful, everybody's interests are served if agencies "get it right the first time." This avoids misunderstanding and the sometimes high transaction costs of correcting the record once misinformation has been broadly disseminated.

An important question that deserves further inquiry is how agencies are responding to evidence of systematic errors in their information systems. Have they identified patterns of errors and what efforts are they undertaking to avoid repeated mistakes?

As an example, EPA has been working for over a decade to improve the quality of the "identification" information about facilities, such as the facility's name, address, geospatial coordinates and technical contacts, that is displayed in the Agency's public Websites. Despite significant efforts, including innovative software and networking with the states, substantial errors continue to occur.

For example, EPA has posted a Website called Enforcement and Compliance History Online, which presents reports on the environmental compliance record of over 800,000 facilities. When the site was first posted, EPA received almost 7,000 correction requests. Roughly half of the requests involved incorrect facility identification information. As a result, some companies have been listed for violations at facilities that they do not own.

The crux of this problem is not a question of technology. The problem arises because EPA continues to allow its various programs to maintain independent databases that collect the same facility identifier information at different times in different ways. Inconsistencies are inevitable in these circumstances.

Within a few weeks, the National Academy of Public Administration will be publishing a report that documents this problem and recommends constructive solutions. CEEI participated in the development of this report, along with a cross-section of public interest groups, state agencies and academic experts. This is a good example of a situation where

systemic changes, the kinds of management changes that the IQA can foster, can bring together the interests of many different parties.

In conclusion, we urge this committee to continue to inquire into the implementation of the IQA. This law addresses a critical need of the E-Government era with common sense principles. In particular, we suggest that the committee provide leadership when needed on the issues outlined in this testimony to assure that the larger objectives of the IQA are served.

Thank you for the opportunity to address the committee.

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